

J. Schatz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Services Administration--
Reconsideration

File: B-234682.2

Date: March 23, 1990

Sam Zalman Gdanski, Esq., for the protester.
Robert C. MacKichan, Jr., Esq., General Counsel, General
Services Administration, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Decision sustaining protest against agency's determination that individual sureties on bid guarantee were unacceptable for pledging their personal residences--when in fact there was no prohibition against pledging of personal residences in support of guarantee--is affirmed on reconsideration even though, after issuance of original decision, agency undertook investigation that revealed other bases for rejecting sureties; original decision was correct based on issues, record and arguments developed by the agency and protester.
2. Where prior decision correctly held that agency improperly found individual sureties unacceptable for pledging their personal residences in support of bid guarantee, and agency presents new information in requesting reconsideration that shows sureties properly were determined unacceptable for different reasons, decision is modified to eliminate recommendation that award be made to protester.
3. Protest costs awarded in connection with sustained protest are disallowed on reconsideration where information surfaces after issuance of decision indicating that the protest was filed even though protester knew or should have known that sureties' personal residences--which, protester had argued and General Accounting Office ultimately found, had improperly been disregarded by agency in rejecting sureties based on inadequate assets--were not solely owned by sureties and thus could not properly be pledged on bid guarantee, as the agency originally had concluded.

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DECISION

The General Services Administration (GSA) requests reconsideration of our decision, Romac Bldg. Servs., Inc., 68 Comp. Gen. 529 (1989), 89-2 CPD ¶ 2, in which we sustained Romac's protest under invitation for bids (IFB) No. GS-02-PPB-SS-089-S036, issued by GSA for janitorial services at federal buildings at JFK Airport, Jamaica, New York.

We affirm our prior decision, but modify the recommendation.

Our prior decision was precipitated by GSA's elimination of Romac from consideration for award as nonresponsible based on inadequate net worths of the individual sureties named on Romac's bid guarantee. The agency reported to us that it found the sureties unacceptable solely because their stated net worths were comprised largely of equity in their personal residences; GSA did not consider personal residences to be readily marketable assets, and thus found both sureties unacceptable and rejected Romac as nonresponsible. We sustained the ensuing protest on the ground that there was no general prohibition against sureties pledging their personal residences under a bid guarantee, and that GSA had not established any legal basis for disregarding the sureties' personal residences pledged in this case. We recommended that the agency terminate Prompt Maintenance Services, Inc.'s contract for the convenience of the government and award a contract to Romac. In addition, we found Romac entitled to recover its costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d) (1989).

In its request for reconsideration, the agency concedes the correctness of our holding that it improperly precluded Romac's sureties from pledging their personal residences in support of the bid guarantee solely on the basis that personal residences are not readily marketable assets. GSA explains, however, that it now has determined that our decision was based on misrepresentations by Romac that the sureties solely owned their residences under titles that would make them suitable as assets in support of a bid guarantee. Specifically, GSA determined, through an investigation conducted after issuance of our decision, that one of the sureties, Mr. Latham, holds title to his personal residence jointly with his wife, and that the other surety, Mr. Bertuglia, does not hold title to his personal residence, the title residing solely with his wife. Since neither surety's wife signed the Affidavit of Individual Surety (SF 28), setting forth the information on each

surety's net worth, GSA determined that both sureties' personal residences would be exempt from execution and sale by the government in case of default by Romac, and that the sureties therefore were unacceptable. GSA concludes that it would be inappropriate to award a contract to Romac, as we recommended, and that, under the circumstances, we also should find that Romac is not entitled to its protest costs.

We will reconsider a decision only where the requester shows that our decision was based on factual or legal errors, or presents evidence not previously considered that warrants reversal or modification of our prior decision. G & C Enters., Inc.--Reconsideration, B-233537.2, May 10, 1989, 89-1 CPD ¶ 439. We are not inclined to reconsider a prior decision where an agency bases its reconsideration request on information it could have but did not present during our initial consideration of the protest. Department of the Navy--Request for Reconsideration, B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728.

Although GSA's reconsideration request is based on information it did not have, and that we therefore did not consider during our resolution of Romac's protest, this clearly was information that GSA could have obtained by conducting a thorough review of Romac's proposed sureties prior to submitting its report. GSA's failure to do so until after we had issued a decision contrary to its position undermines the goal of our bid protest forum to produce decisions based on a fully developed record. Department of the Navy--Request for Reconsideration, B-220991.2, supra.

We conclude that our prior decision was correct based on the record developed by GSA and Romac, and we will not reconsider that decision based on GSA's arguments. However, based on the information GSA now has furnished, we agree with the agency that our recommendation and award of protest costs no longer are appropriate.

Our recommendation that GSA terminate the awardee's contract and make award to Romac was not intended to preclude GSA from fulfilling its responsibility for determining whether Romac was otherwise eligible for the award. Specifically, GSA was not bound to make award to Romac as a responsible bidder if information subsequently obtained showed that its proposed sureties in fact are unacceptable; the acceptability of an individual surety, as a matter of responsibility, may be established any time prior to contract award. See Carson & Smith Constructors, Inc., B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560. The contracting officer is vested with a wide degree of discretion and business judgment in determining surety acceptability, and we will

defer to the contracting officer's decision where it is reasonable. Id.

Applying this standard, we find that the information obtained by GSA subsequent to our decision provided a reasonable basis for finding the sureties unacceptable. As stated above, the agency's investigation revealed that neither surety solely owned their personal residence, contrary to the representations in their SF 28s, under the asset category entitled "fair value of solely-owned real estate." GSA also found that another parcel of real property pledged as solely-owned real estate in fact was only leased by the surety, with New York City retaining title to the property. In view of the sureties' misstatements concerning their assets, we think GSA properly concluded that they were unacceptable, and that Romac therefore is nonresponsible. Farinha Enters., Inc., 68 Comp. Gen. 666 (1989), 90-1 CPD ¶ ____.

The protester does not dispute the agency's findings, but asserts that the listed properties nevertheless have substantial value and that its sureties possess other unquestioned assets establishing adequate net worth and that they should be given the opportunity to establish this fact. However, once a surety's integrity reasonably has been called into question based on misstatements in the SF 28, the agency is justified in rejecting the sureties without considering the sufficiency of other surety assets. Farinha Enters., Inc., 68 Comp. Gen. 666, supra. Our view in this regard reflects the nature of the surety obligation as a financial guarantee and the importance we think an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information. Id.

We also withdraw our award of Romac's protest costs. Romac did successfully argue a point of law in its protest--in considering the adequacy of sureties' assets pledged on a bid guarantee, agencies cannot disregard the value of personal residences pledged by the sureties. The information now presented by GSA, however, establishes that Romac advanced this argument even though the sureties' personal residences were of no value for the purpose they were pledged. One of the sureties, Mr. Bertuglia, is Romac's president and signed the firm's bid. Thus, it is clear that Romac pursued its protest even though it knew or should have known that Mr. Bertuglia's personal residence was not an acceptable surety asset, and that Mr. Bertuglia had misrepresented it as solely owned real property on his SF 28. The record does not reflect whether Mr. Latham also is an officer or director of the protesting corporation. Even if Mr. Latham is not related to Romac, in view of the

fact that Mr. Bertuglia was not the sole owner of his residence, we believe that Romac had a duty to determine the ownership of Mr. Latham's residence before protesting GSA's failure to consider the assets. It evidently did not do so. In these circumstances, Romac is not entitled to reimbursement of its protest costs.

Our prior decision is affirmed; our recommendation is modified.

A handwritten signature in cursive script, reading "Milton J. Asar".

Acting Comptroller General
of the United States